

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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THERESA WENZEL,

Plaintiff,

v.

CAROLYN W. COLVIN,  
Acting Commissioner of Social Security,

Defendant.

Case No. 3:13-cv-00074-MMD-WGC

ORDER

**I. SUMMARY**

Before the Court is Magistrate Judge William G. Cobb's Report and Recommendation ("R&R") (ECF No. 23) regarding Plaintiff Theresa Wenzel's Motion for Reversal and/or Remand of the Commissioner's Decision (ECF No. 15), and a Cross-Motion to Affirm filed by Defendant Commissioner Carolyn W. Colvin ("Commissioner") (ECF No. 18). The Court has also reviewed Defendant's objection to the R&R (ECF No. 24), and Plaintiff's response (ECF No. 25).

**II. BACKGROUND**

Plaintiff filed for Disability Insurance Benefits on July 22, 2009. (AR 119-22.)<sup>1</sup> Her application was denied after an initial review and upon reconsideration. (AR 68, 74.) Plaintiff sought review of the decision by an administrative law judge ("ALJ") on August 24, 2010; she appeared before the ALJ on September 6, 2011. (AR 39-64, 77-78.)

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<sup>1</sup>Defendant manually filed a complete Administrative Record ("AR") with the Court in January 2014. (ECF No. 10.) The Court will cite to the internal page numbers that appear in the bottom, right-hand corner of the manually filed AR.

1 Plaintiff claims that she suffers from fibromyalgia syndrome, migraine headaches,  
2 lumbar degenerative disc disease, alopecia areata, and asthma. (AR 25.) She asserts  
3 that debilitating pain from her fibromyalgia and degenerative disc disease makes her  
4 unable to do work. (See AR 61-62.) Proceeding through the sequential five-step analysis  
5 used to determine whether a claimant is disabled for purposes of disability benefits, 20  
6 CFR 404.1520(a), the ALJ determined that Plaintiff had not engaged in substantial  
7 gainful activity since July 16, 2009, and that her impairments were severe.<sup>2</sup> (AR 25.) In  
8 addition to Plaintiff's testimony, the ALJ considered medical evidence and opinions from  
9 several doctors, including Plaintiff's treating physicians, a consultative physician, and a  
10 Disability Determination Service ("DDS") physician. (AR 29-32.) Among other findings,  
11 both Dr. Richard Gasparre, the consultative physician, and Dr. Julius Villaflor, the DDS  
12 physician, concluded that Plaintiff could sit, stand, and/or walk for six hours during an  
13 eight-hour workday, climb stairs and ramps at least occasionally, and perform other  
14 physical activities — like carrying and lifting items of varying weights, balancing,  
15 stooping, crawling, or kneeling — either frequently or occasionally. (AR 31-32.) The ALJ,  
16 however, gave little weight to Dr. Gasparre's opinion because he did not have access to  
17 the medical evidence. (AR 31.) Dr. Villaflor's opinion, by contrast, received significant  
18 weight because it was consistent with the objective medical evidence. (AR 32.) The ALJ  
19 also credited Dr. Villaflor's expertise in evaluating disability benefit claims. (AR 32.)

20 In an October 2011 order, the ALJ found that Plaintiff had a residual functional  
21 capacity ("RFC") to perform light work, including her past relevant work as a dispatcher  
22 and other "sedentary and light occupations" that exist in the national economy. (AR 27-  
23 34.) The ALJ arrived at this RFC determination by discounting Plaintiff's subjective  
24 testimony regarding her symptoms. (AR 28-29.) According to the ALJ, Plaintiff's

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25 <sup>2</sup>Plaintiff also claimed that she suffered from depression and anxiety. (AR 25-26.)  
26 The ALJ found no evidence that Plaintiff's depression and anxiety constituted a severe  
27 impairment that would limit her ability to perform work. (AR 26.) The ALJ likewise  
28 concluded that Plaintiff's weight fluctuations and history of cervical cancer did not  
constitute severe impairments. (AR 26.) Plaintiff has not challenged these findings on  
appeal. (See ECF No. 15 at 5-9.)

1 testimony was contradicted by the medical evidence and opinions described above,  
 2 which suggested that her symptoms were less severe than she had alleged. (AR 28-32.)  
 3 The ALJ accordingly found that Plaintiff was not disabled for purposes of disability  
 4 insurance benefits. (AR 34.) Plaintiff petitioned the Social Security Appeals Council to  
 5 review the ALJ's decision, but her request was denied. (AR 1-3.)

6 The R&R recommends remanding the ALJ's decision for further proceedings.  
 7 (ECF No. 23 at 28-29.) Magistrate Judge Cobb found that, with regard to Plaintiff's  
 8 fibromyalgia and spinal stenosis,<sup>3</sup> the ALJ failed to articulate clear and convincing  
 9 reasons for discounting Plaintiff's testimony about the severity of her symptoms. (*Id.* at  
 10 23.) Judge Cobb further concluded that the ALJ erred by discrediting Plaintiff's testimony  
 11 as contradictory to medical opinion evidence, which, in turn, was not supported by  
 12 substantial evidence. (*Id.* at 27.) The R&R therefore recommends granting Plaintiff's  
 13 Motion for Reversal and/or Remand (ECF No. 15) and denying Defendant's Cross-  
 14 Motion to Affirm (ECF No. 18). For the reasons discussed below, the R&R is adopted in  
 15 full.<sup>4</sup>

### 16 **III. LEGAL STANDARD**

17 This Court "may accept, reject, or modify, in whole or in part, the findings or  
 18 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party  
 19 timely objects to a magistrate judge's report and recommendation, the court is required  
 20 to "make a de novo determination of those portions of the [report and recommendation]  
 21 to which objection is made." 28 U.S.C. § 636(b)(1). In light of Martin's objection, the  
 22 Court will review *de novo* the two portions of the R&R relevant to the objection.

23 <sup>3</sup>As for Plaintiff's testimony about her migraines, Judge Cobb found that  
 24 substantial evidence supports the ALJ's decision to discredit that testimony. (ECF No. 23  
 25 at 26.) Neither party has objected to this determination. The Court will accordingly adopt  
 it. See *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (a district  
 court is not required to review a magistrate judge's report and recommendation where no  
 objections have been filed).

26 <sup>4</sup>The R&R additionally details the procedural history of Wenzel's claims, offers a  
 27 summary of the ALJ's findings and relevant testimony, and spells out the applicable legal  
 28 standards under the Social Security Act. (ECF No. 23 at 1-8.) These portions of the R&R  
 are not in dispute, and the Court adopts them in their entirety. See *Reyna-Tapia*, 328  
 F.3d at 1121.

1 Congress has provided a limited scope of judicial review of the Commissioner's  
2 decision to deny benefits under the Social Security Act. In reviewing findings of fact, the  
3 Court must determine whether the Commissioner's decision is supported by substantial  
4 evidence. 42 U.S.C. § 405(g). "Substantial evidence is more than a mere scintilla but  
5 less than a preponderance; it is such relevant evidence as a reasonable mind might  
6 accept as adequate to support a conclusion." *Gutierrez v. Comm'r of Soc. Sec. Admin.*,  
7 740 F.3d 519, 522–23 (9th Cir. 2014) (quoting *Hill v. Astrue*, 698 F.3d 1153, 1159 (9th  
8 Cir. 2012)). The Court must consider the entire record as a whole to determine whether  
9 substantial evidence exists, and must consider evidence that both supports and  
10 undermines the ALJ's decision. *Id.* at 523. In weighing the evidence and making  
11 findings, the ALJ must also apply the proper legal standards. *Id.* (citing *Bray v. Comm'r*  
12 *of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009); *Benton v. Barnhart*, 331 F.3d  
13 1030, 1035 (9th Cir. 2003)).

#### 14 **IV. ANALYSIS**

15 The R&R tracks the two issues that Plaintiff raised in her Motion to Remand (ECF  
16 No. 15): first, whether the ALJ properly discredited Plaintiff's subjective testimony, and  
17 second, whether Dr. Villaflor's opinion — which the ALJ gave great weight in discounting  
18 Plaintiff's credibility — was supported by substantial evidence. (See ECF No. 23 at 12-  
19 23, 26-28.) The R&R concludes that the ALJ's opinion was improper on both grounds.  
20 (*Id.*) Defendant, however, insists that the R&R ignores portions of the ALJ's opinion,  
21 which discuss substantial evidence in the record regarding Plaintiff's credibility and Dr.  
22 Villaflor's opinion. (ECF No. 24 at 2-4.) According to Defendant, for example, the ALJ  
23 identified medical evidence demonstrating that Plaintiff's symptoms improved with  
24 treatment, which is a valid reason to discount her testimony. (*Id.*) As for Dr. Villaflor's  
25 medical opinion evidence — which, per the R&R, erred by ignoring evidence of Plaintiff's  
26 fibromyalgia — Defendant argues that the record directly contradicts the R&R's  
27 conclusion. (*Id.* at 4-8.) The Court will address each argument in turn.

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1           **A.       Timeliness of Defendant's Objection**

2           As an initial matter, Plaintiff urges the Court to disregard Defendant's objection  
3 because it is allegedly untimely. The R&R, which was issued on April 6, 2015, instructed  
4 Defendant to file any objection within fourteen (14) days of the date of its receipt. (ECF  
5 No. 23 at 30.) Defendant filed its objection on April 21, 2015. (ECF No. 24.) According to  
6 the time calculations spelled out in Rule 6(a) of the Federal Rules of Civil Procedure, the  
7 14-day period would have elapsed on April 20, 2015. See Fed. R. Civ. P. 6(a)(1). Rule  
8 6(d), however, also specifies that 3 additional days are given to parties who must act  
9 within a specified time period and who are served with a document electronically. Fed.  
10 R. Civ. P. 6(d) (citing Fed. R. Civ. P. 5(b)(2)(E)). Because the R&R was distributed to the  
11 parties through the Court's electronic filing system (ECF No. 23), Defendant had 3 days  
12 in addition to the 14-day period during which it could file an objection. Defendant's  
13 objection is timely.

14           **B.       The Medical Evidence Does Not Contradict Plaintiff's Testimony**

15           Defendant insists that the ALJ properly discounted Plaintiff's credibility because  
16 her complaints contradicted objective medical evidence about her response to  
17 treatments. (ECF No. 24 at 2-4.) The ALJ's findings, Defendant contends, were  
18 supported by ample citations to the record, which the R&R overlooked. (*Id.*) Plaintiff  
19 argues that the R&R was correct in concluding that the ALJ should not have discounted  
20 her testimony based on evidence that her symptoms improved with treatment. (ECF No.  
21 25 at 4-5.) Instead, just as the R&R explains, the medical evidence shows that any  
22 improvements to Plaintiff's symptoms were fleeting. (*Id.*)

23           The ALJ is responsible for determining credibility. *Meanel v. Apfel*, 172 F.3d 1111,  
24 1113 (9th Cir. 1999). The ALJ must first "determine whether the claimant has presented  
25 objective medical evidence of an underlying impairment which could reasonably be  
26 expected to produce the pain or other symptoms alleged." *Lingenfelter v. Astrue*, 504  
27 F.3d 1028, 1036 (9th Cir. 2007). "If the claimant meets the first test and there is no  
28 evidence of malingering, the ALJ may only reject the claimant's testimony about the

1 severity of the symptoms if he or she gives ‘specific, clear and convincing reasons’ for  
2 the rejection.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (quoting  
3 *Lingenfelter*, 504 F.3d at 1036). An ALJ’s findings are supported by substantial evidence  
4 if they are “sufficiently specific to allow a reviewing court to conclude the adjudicator  
5 rejected the claimant’s testimony on permissible grounds and did not arbitrarily discredit  
6 a claimant’s testimony regarding pain.” *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th  
7 Cir. 1991). “[T]he claimant is *not* required to show ‘that her impairment could reasonably  
8 be expected to cause the severity of the symptom she has alleged; she need only show  
9 that it could reasonably have caused some degree of the symptom.’” *Garrison*, 759 F.3d  
10 at 1014 (emphasis in original) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir.  
11 1996)). The ALJ may not reject subjective pain testimony “on the sole ground that it is  
12 not fully corroborated by objective medical evidence[.]” *Rollins v. Massanari*, 261 F.3d  
13 853, 857 (9th Cir. 2001).

14 The R&R relies on *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014), in  
15 finding that the ALJ erred by discounting Plaintiff’s testimony because the evidence  
16 suggested that her symptoms improved with medication and other treatments. (ECF No.  
17 23 at 14-15, 22-23.) In *Garrison*, the plaintiff complained of severe neck and back pain  
18 and periodic psychological episodes that were poorly remedied — if at all — by  
19 medication and other treatments. See *Garrison*, 759 F.3d at 1001-02, 1005, 1013. The  
20 ALJ, however, denied the plaintiff’s request for social security benefits. *Id.* at 998-99. The  
21 Ninth Circuit documented a series of “egregious” errors in the ALJ’s review of the  
22 medical evidence, including “manufactur[ing] a conflict with respect to the outcome of  
23 treatment by asserting that [a treating physician’s] records showed ‘consistent[.]’  
24 improvement, when in fact they show consistent cervical and lumbar radiculopathy that  
25 responded only very briefly and partially to treatment.” *Id.* at 1013. The court further  
26 rejected the ALJ’s rationale for discrediting the plaintiff — contrary to the ALJ’s opinion  
27 that the plaintiff’s physical impairments improved with treatment, the medical evidence  
28 showed those treatments “afforded her only partial and short-lived relief,” “variable, brief”

1 relief, or “no effective relief” at all. *Id.* at 1015. Medication similarly caused distracting  
2 side-effects and “provided only limited periods of relief from otherwise-constant pain.” *Id.*

3 Defendant argues that the R&R’s use of *Garrison* is misplaced. Here, Defendant  
4 contends, the medical evidence demonstrates that Plaintiff’s various treatments helped  
5 abate her symptoms. (ECF No. 24 at 2.) The ALJ notes that Plaintiff received  
6 medication, steroidal trigger point injections, and epidural injections to control her pain  
7 associated with fibromyalgia and degenerative disc disease. (AR 29.) The ALJ further  
8 points out that Plaintiff’s treating physician noted an 80% improvement to Plaintiff’s lower  
9 back pain after her lumbar epidural in July 2009. (AR 29.) She became pregnant shortly  
10 thereafter, which required discontinuing or modifying some of her treatments. (AR 29.)  
11 The ALJ notes that Plaintiff returned to physical therapy in November 2010 (after giving  
12 birth to a healthy baby); she reported some improvement in terms of pain, but still rated  
13 her pain at 5 or 6 out of 10. (AR 29, 403.)

14 Because “[i]mpairments that can be controlled effectively with medication are not  
15 disabling,” Defendant contends that the ALJ properly discounted Plaintiff’s testimony in  
16 light of her positive response to treatment. (*Id.* (quoting *Warre v. Comm’r of Soc. Sec.*  
17 *Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006))). Defendant argues that the ALJ’s opinion  
18 adequately documents Plaintiff’s continued improvement with treatment. (*See id.* at 3-4.)  
19 Defendant cites to several instances in the record, which suggest that Plaintiff  
20 experienced some improvements immediately following her treatments, both before and  
21 after her pregnancy. (*Id.* (quoting AR 408, 495 (noting that Plaintiff’s physical therapist  
22 stated that she had “improved dramatically” as of July 2010, and that, as of December  
23 2010, Plaintiff had a “significant benefit” from her epidural injections))).)

24 The R&R, however, highlights many instances in the record indicating that Plaintiff  
25 continued to experience severe pain even alongside her treatments. (ECF No. 23 at 21-  
26 22.) For example, during a December 2010 visit to a treating physician, Plaintiff  
27 complained of pain at a level of 6 to 8 out of 10, with worsening symptoms. (*Id.* at 21  
28 (citing AR 495-96).) Notes from the same visit state that Plaintiff had a “significant



1 benefit” from her most recent epidural injection. (AR 495.) During follow-up visits over  
2 the next several months, Plaintiff continued to report pain at a level of 6 to 8 out of 10,  
3 with worsening symptoms. (AR 491-94.) She also experienced significant relief from her  
4 epidural injections, as well as some relief from trigger point injections. (AR 488, 491-94.)  
5 As the R&R recounts, however, Plaintiff reported significant pain as of July 2011, which  
6 was made worse by her trigger point injections. (ECF No. 23 at 22 (citing AR 485).)  
7 Although she experienced immediate benefits from an epidural injection a week before,  
8 Plaintiff had only “50% residual benefit” from the injection. (AR 485.)

9 Despite Defendant’s objection, the Court agrees with the Magistrate Judge’s  
10 finding that the ALJ erred in discrediting Plaintiff’s testimony. The record suggests that  
11 Plaintiff’s symptoms returned shortly after she received epidural injections, and were  
12 exacerbated by the trigger point injections. Even if Plaintiff experienced some “partial  
13 and short-lived” benefit from her treatments, *Garrison*, 759 F.3d at 1015, the record does  
14 not demonstrate that Plaintiff’s symptoms were effectively controlled by medication and  
15 treatments. The Court therefore finds that the ALJ erred in discrediting Plaintiff’s  
16 testimony based on the medical evidence — while Plaintiff received some fleeting  
17 benefits from her treatments, the evidence suggests that she continued to experience  
18 severe pain from her lumbar degenerative disc disease and fibromyalgia. The Court will  
19 therefore adopt the R&R’s analysis on this issue.<sup>5</sup> (ECF No. 23 at 22-23.)

### 20 **C. Substantial Evidence Does Not Support Dr. Villaflor’s Opinion**

21 The R&R additionally concludes that the ALJ erred in discounting Plaintiff’s  
22 testimony in light of contradictory medical opinion evidence. (ECF No. 23 at 26-28.) The  
23 ALJ gave great weight to a check-the-box analysis offered by Dr. Villaflor, a state  
24 disability physician. (AR 31-32.) Dr. Villaflor’s assessment includes a “check the box”  
25 opinion of Plaintiff’s symptoms and two short paragraphs in the “additional comments”

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26 <sup>5</sup>The R&R also found that Plaintiff’s migraines were adequately controlled by  
27 medication. (ECF No. 23 at 26.) Neither party has contested that finding. (See ECF Nos.  
28 24, 25.) The Court agrees with the R&R’s conclusion that substantial evidence supports  
the ALJ’s decision to discredit Plaintiff’s testimony about the severity of her migraines.  
(ECF No. 23 at 23-26.)




1 where he noted that “fibromyalgia was mentioned,” but his opinion disregarded this  
2 medical condition because he did not see any supporting documentation. (AR 391.)  
3 However, the records show Plaintiff’s treating physician (Dr. Pitman) tested the  
4 myofascial trigger points and found Plaintiff suffered myofascial aches and pain  
5 consistent with fibromyalgia (AR 264). The Court thus agrees with the R&R’s finding that  
6 the ALJ erred in discrediting Plaintiff’s testimony as to her symptoms as it was not  
7 supported by Dr. Villaflor’s opinion because Dr. Villaflor’s opinion is not supported by  
8 substantial evidence.

9 **V. CONCLUSION**

10 It is therefore ordered that the Report and Recommendation of Magistrate Judge  
11 William G. Cobb (ECF No. 23) is accepted and adopted in full. Plaintiff’s Motion for  
12 Reversal and/or Remand (ECF No. 15) is granted. Defendant Commissioner Carolyn W.  
13 Colvin’s Cross-Motion to Affirm (ECF No. 18) is denied. This matter is remanded to the  
14 ALJ for further proceedings. The Clerk is directed to enter judgment consistent with this  
15 Order and close this case.

16 DATED THIS 15<sup>th</sup> day of August 2016.

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20 MIRANDA M. DU  
21 UNITED STATES DISTRICT JUDGE  
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